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STATE OF MICHIGAN

IN THE SUPREME COURT

DAVID J. McQUEER,

Plaintiff-Appellee,

v

PERFECT FENCE COMPANY,

Defendant-Appellant.
_____/

Supreme Court
Case No. 153829

Court of Appeals
Case No. 325619

Grand Traverse Circuit Court
Case No. 14-030287-NO

DEFENDANT-APPELLANT PERFECT FENCE COMPANY'S REPLY TO PLAINTIFF-APPELLEE'S SUPPLEMENTAL BRIEF

Proof of Service

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1. Whether the statutory employer provision of MCL 418.171 is applicable to the plaintiff's claim.

Plaintiff's supplemental brief does not address the caselaw (13 opinions) and Senate Legislative Analyses cited as authorities in defendant's supplemental brief. Those authorities stand for the proposition that MCL 418.171 is not applicable to plaintiff's claim, because plaintiff's claim does not concern a situation in which there were three parties involved: namely, two employers--an insured principal and an uninsured contractor--and an injured employee of the uninsured contractor.

Moreover, on pages 16-17 of his supplemental brief, plaintiff relies on three opinions that are not applicable, because in each of them, the defendant-employer did not maintain a worker's compensation insurance policy.[1] Here, defendant Perfect Fence maintained a worker's compensation insurance policy. Further, plaintiff has been paid benefits under that policy.

2. Even assuming that the statutory employer provision of MCL 418.171 is applicable to the plaintiff's claim, whether the plaintiff has established a genuine issue of material fact sufficient to avoid summary disposition

Plaintiff's supplemental brief relies on the argument that there is evidence which "supports the conclusion that the scheme that Perfect Fence had engaged in with respect to hiding Mr. McQueer's employment status [from Perfect Fence's worker's compensation insurer] was designed with a particular purpose in mind--his true status was kept hidden 'for the purpose

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[1] The three opinions are *Smeester v Pub-N-Grub, Inc (On Remand)*, 208 Mich App 308, 310; 527 NW2d 5 (1995), lv den 450 893 (1995), recon den 546 NW2d 253 (1996) (the defendant-employer "did not carry worker's compensation insurance"); *State Farm Mut Auto Ins Co v Roe (On Rehearing)*, 226 Mich App 258, 265-266 n 2; 573 NW2d 628 (1997) (the defendant-employer "decided not to comply with his legal requirement as an employer" when he "chose not to renew his [worker's compensation insurance] coverage"); and *McCaul v Modern Tile and Carpet, Inc*, 248 Mich App 610, 623; 640 NW2d 589 (2002) ("plaintiff has alleged that defendant violated subsection 171(4) of the WDCA by failing to secure insurance liability coverage pursuant to § 611"). Please see Defendant-Appellee Perfect Fence Company's Brief on Appeal in the Court of Appeals, pp 29-32, where these opinions and others were discussed. (666a-669a; Ex 14, pp 29-32.)

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of evading . . . the requirements of section 611.' " (Plaintiff's Supplemental Brief, p 21.) Section 611 requires employers to maintain coverage for worker's compensation liability, either through self-insurance or by maintaining a worker's compensation insurance policy. There cannot possibly be any such evidence to evade this requirement of maintaining coverage for worker's compensation liability, because Perfect Fence at all times maintained coverage for worker's compensation liability. Moreover, plaintiff has been paid benefits under the worker's compensation liability insurance policy that Perfect Fence maintained.

As the trial court recognized (see 567a - 571a; Ex 10, pp 32-40), even if it were assumed for the sake of argument that Perfect Fence committed all the deceitful or coercive actions alleged by plaintiff, those actions could not have been committed for the (statutorily required) purpose of evading the requirements of § 611 or the requirements of §171, because Perfect Fence maintained coverage for worker's compensation liability (as required by § 611) at all times. And Perfect Fence paid worker's compensation benefits to plaintiff (as required by § 171, even if it were assumed that Perfect Fence was a statutory employer or principal under that section).

Finally, plaintiff's observation on page 24 of his supplemental brief that "an insurer may invoke common-law defenses to avoid enforcement of an insurance policy" is not relevant here.[2]

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[2] Plaintiff cites *Titan Ins Co v Hyten*, 491 Mich 547; 817 NW2d 562 (2012), and *Group Ins Co of Michigan v Czopek*, 440 Mich 590; 489 NW2d 444 (1999), for the proposition that an insurance company cannot be found liable for a risk it did not assume. (Plaintiff's Supplemental Brief, pp 24-25.) Plaintiff in this case is not an insurance company which is able to raise fraud as a basis for not paying benefits under a policy of insurance it issued. And Perfect Fence's worker's compensation insurer, Accident Fund Insurance Company, has not only never filed any action seeking to avoid its payment of worker's compensation benefits to plaintiff, but it has already actually paid plaintiff worker's compensation benefits. Moreover, Michigan law mandates that every policy of worker's disability compensation insurance written by an insurer for a Michigan employer must insure, cover, and protect *all* of the employees of the employer. MCL 418.621(2). Please see Defendant-Appellee Perfect Fence Company's Brief on Appeal in the Court of Appeals, pp 32-34, where these opinions were discussed. (669a-671a; Ex 14, pp 32-34.)

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This case has nothing to do with an insurer trying to deny benefits to anyone based on alleged fraud perpetrated on it by its insured. Again, Perfect Fence at all times maintained coverage for worker's compensation liability, and plaintiff has been paid benefits under the worker's compensation liability insurance policy that Perfect Fence maintained.

3. Whether the Court of Appeals erred by reversing the Grand Traverse Circuit Court's order denying, on the basis of futility, the plaintiff's motion to amend his complaint to add an intentional tort claim

Plaintiff's supplemental brief does not address the ground on which the Court of Appeals relied in reversing the Grand Traverse Circuit Court's order denying the plaintiff's motion to amend his complaint to add an intentional tort claim.

The Court of Appeals reversed the Grand Traverse Circuit Court's order denying the plaintiff's motion to amend his complaint to add an intentional tort claim on the following ground: "Instead of determining whether an injury was probable on any given use of the Bobcat with a man beneath it, the trial court should have determined whether Peterson subjected plaintiff 'to a continuously operative dangerous condition' that he knew would cause an injury." (710a; Ex 15, p 7.) The Court of Appeals went on to find that "plaintiff was exposed to the existence of a continually operative dangerous condition because every time the [Bobcat's] bucket was used the potential existed that it would knock the post too far, thereby resulting in injury to plaintiff." (711a; Ex 15, p 8.)

Thus, the Court of Appeals reversed the Grand Traverse Circuit Court's order on the basis of the applicability of the so-called "continuously operative dangerous condition" doctrine. Plaintiff's supplemental brief does not discuss the "continuously operative dangerous condition" doctrine.

Opinions from this Court, from the Court of Appeals, and from the Sixth Circuit Court of Appeals have specified that the "continuously operative dangerous condition" doctrine applies

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only when an employer knows of a continuously operative dangerous condition and yet refrains from informing the employee of that dangerous condition, so as to leave the plaintiff in the dark as to the existence of that dangerous condition. (See caselaw cited in Defendant-Appellant Perfect Fence's Supplemental Brief, pp 11-14.) Here, however, as plaintiff acknowledges on page 30 of his supplemental brief, plaintiff and his coworker Mike Peterson were both told in no uncertain terms by a co-owner of Perfect Fence Company, Bob Krumm, that it was "dangerous as hell" to use a Bobcat bucket to push down a fence post and that if they did that, it would be "guaranteed you're going to get hurt"; and that Mr. Krumm further instructed both plaintiff and Peterson that "you guys better not do that." (Plaintiff's Supplemental Brief, p 30.)

The Court of Appeals opinion in this case should not be left unreversed. It will be used by any injured employees in the state as support for the legally erroneous position that they are entitled to sue their employers in tort--in avoidance of the WDCA's exclusive remedy provision, MCL 418.313(1)--on the basis that they were exposed to a "continuously operative dangerous condition" when they were injured while doing precisely what they were told by their employers never to do because it was too dangerous to do. That position stands in direct conflict with the clear legislative language and intent of the WDCA.

GARAN LUCOW MILLER, P.C.

Date: March 7, 2018

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PROOF OF SERVICE

Proof of Service: I certify that a copy of a **DEFENDANT-APPELLANT PERFECT FENCE COMPANY'S REPLY TO PLAINTIFF-APPELLEE'S SUPPLEMENTAL BRIEF,** and this **PROOF OF SERVICE** were served on the following as indicated below:

Date of Service: March 7, 2018

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